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# Supreme Court of the United States

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CHARLES L. DOUGLAS,
*Petitioner,*

against

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.

## BRIEF ON BEHALF OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

### Opinions of the Courts below

The Special Term of the Supreme Court of the State of New York rendered the following unreported opinion:

> "The Court of Appeals in the *Murnan* case (246 N. Y. 244) has settled the question as to the discretionary power of the Supreme Court at Special Term to grant this motion, and I think that that discretion should be so exercised as to relieve the Courts of this State of the burden of cases that arise in another state and in which none of the parties is a resident of this State. Motion granted" (R., 16, 17).

The Appellate Division of the Supreme Court, Second Department, affirmed the order of Special Term, but wrote no opinion. 223 App. Div. 782 (R., 18).

The Court of Appeals, on May 29th, 1928, in 248 N. Y. 580, rendered the following memorandum opinion:

> "Judgment affirmed, with costs, on authority of *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244."

## Jurisdiction of this Court

The judgment sought to be reviewed is dated May 29th, 1928 (R., 1, 2). The present petition was filed in this court on July 26th, 1928.

The service of the summons and complaint was vacated and the action dismissed at Special Term (R., 4, 5). This order was unanimously affirmed by the Appellate Division of the Supreme Court (R., 18). The Court of Appeals affirmed the judgment entered upon the order (R., 1, 2).

The authority for the decision in the present case, as expressed in the opinions of the Special Term and the Court of Appeals, is *Murnan* v. *Wabash Railway Co.*, *supra*, which held that the courts of New York are invested with discretion to decline jurisdiction of an action brought under the Federal Employers' Liability Act by a non-resident of the State of New York against a foreign railroad corporation, doing business in the State of New York at the time of the commencement of the action; and also that the motion of the defendant Railway Company for an order vacating the service of the summons and complaint and dismissing the action should not have been granted as a matter of law.

## Statement of the Case

The plaintiff-petitioner brought this action to recover for injuries alleged to have been received on December 1st, 1927, while in the defendant's employ in the defendant's railroad yards at Waterbury, Connecticut. The complaint alleges that the plaintiff and defendant were engaged in interstate commerce; that the defendant is a foreign Connecticut State railroad common carrier corporation (R., 8, 9). Plaintiff was a resident of Waterbury, Connecticut, at the time of the injury and at the time of the institution of the suit (R., 10). He was and is a citizen of the United States, and a citizen and resident of the State of Connecticut (R., 17).

The summons and complaint were served upon the respondent-defendant in the City of New York, on December 22nd, 1927 (R., 2). The service was made upon Frank E. Hall, Assistant Treasurer of The New York, New Haven and Hartford Railroad Company (R., 6). Frank E. Hall is the person designated upon whom process may be made within New York State (R., 7, 9).

The respondent is organized under and by virtue of the laws of the State of Connecticut, and is authorized to do business in the State of New York, and was and is engaged in interstate commerce. It is a railroad corporation. It applied for and received a certificate to do business in New York from the Secretary of the State as provided by the General Corporation Law of New York (R., 7).

In its motion to dismiss the complaint the respondent urged that it would be unnecessarily burdensome to try

this case in New York and that petitioner would be more conveniently served by trial in Connecticut, where he resided, and where the accident took place (R., 7, 8). The respondent moved for an order vacating the service of the summons and complaint and dismissing the action on the ground that the cause of action having accrued wholly without the State of New York and the parties being non-residents, the jurisdiction of the court was wholly discretionary; that the court should, in the exercise of its discretion, decline to retain jurisdiction thereof; that § 47, Subdivision 4, of the General Corporation Law of New York is invalid under the commerce clause of the federal Constitution in so far as it permits the court to assert jurisdiction; that both that section and the action constitute an unjust burden on interstate commerce (R., 5).

## Summary of Respondent's Argument

I. The courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.

(a) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

(b) Congress cannot enlarge state jurisdiction.

(c) By statute and construction, the New York courts are given discretionary jurisdiction.

(d) Petitioner's argument that the Supreme Court of the State of New York is without power to refuse jurisdiction, and to dismiss a complaint, in an action under the Federal Employers' Liability Act, against a railroad common carrier, doing business in the State of New York, is not tenable.

II. The order and judgment do not violate § 2, of Article IV of the Constitution of the United States.

(a) The discrimination alleged under § 2 of Article IV is not between citizens and non-citizens, but between residents and non-residents.

(b) A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment.

(c) Because the exercise of jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable and, therefore, not a violation of § 2 of Article IV of the Constitution.

(d) Under New York statutes respondent has not consented to more than discretionary jurisdiction.

(e) To treat this case as one of compulsory jurisdiction would impair the obligation of the contract between the respondent and the State of New York in violation of Article I, § 10, paragraph 1 of the United States Constitution.

(f) Petitioner's argument as to alleged violation of Article IV, § 2 of the Constitution is invalid.

## ARGUMENT

### POINT I

**The courts of New York are invested with discretion to entertain jurisdiction of an action brought under the Federal Employers' Liability Act by a resident of Connecticut, who also happens to be a citizen of that State, against a corporation railroad common carrier, organized and existing under the laws of the State of Connecticut, doing business in the State of New York at the time of the commencement of the action and at the time of the commission of the tort, the cause of action arising out of a tort committed in the State of Connecticut.**

The above is, in effect, the decision of the Court of Appeals in *Douglas* v. *The New York, New Haven and Hartford Railroad Company*, decided on May 29th, 1928, on the authority of *Murnan* v. *Wabash Railway Co., supra.*

(a) Congress has not attempted to enlarge state jurisdiction by the Federal Employers' Liability Act.

In the first place, this is indicated by the wording of the statute itself. The Act of Congress of April 22nd, 1908, c. 149, § 6, as amended by the Act of April 5th, 1910, c. 143, § 1, being 35 Stat. 66 and 36 Stat. 291, reads in part as follows:

> "Under this Act an action may be brought in a (circuit court) of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United

> States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

In the second place, the effect of the use of the word "concurrent" is analogous to its use in the Eighteenth Amendment of the Constitution. It does not mean joint jurisdiction any more than "concurrent power" in the Eighteenth Amendment means joint power. *National Prohibition Cases*, 253 U. S. 350, 387. Furthermore, neither the statute nor the Amendment is "the source of the power of the states." *United States* v. *Lanza*, 260 U. S. 377, 381; *Hebert* v. *Louisiana*, 272 U. S. 312, 315.

In the third place, in the Act quoted we find the words "competent jurisdiction," referring to the state courts. Now the Judicial Code, § 28, Act March 3rd, 1911, c. 231, § 28, 36 Stat. 1094, as amended, Act January 20th, 1914, c. 11, 38 Stat. 278, reads in part as follows:

> "Provided, That no case arising under an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

Here again are the words "competent jurisdiction." Manifestly Congress intended not to enlarge state jurisdiction, for otherwise the phrasing would be totally unnecessary.

The decisions of this and other courts bear out the

statutory interpretation that we have given. In *Chambers* v. *Baltimore & Ohio R. R.*, 207 U. S. 142, it was held that "subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its Courts, and the character of the controversies which shall be heard in them" (p. 148). While this case was decided in 1907 and consequently could not refer to the effect of the Act under consideration, it enunciated a general principle of long standing.

The cause of action in *Second Employers' Liability Cases*, 223 U. S. 1, was based on the 1908 Act. The Supreme Court of Errors of Connecticut had erroneously expressed the opinion that the federal courts had exclusive jurisdiction. This court said that it was not the intention to restrict the enforcement of the rights to the federal courts. But the jurisdiction of the state courts must be adequate to the occasion. Congress did not attempt to enlarge or regulate this jurisdiction. The States can still prescribe their modes of procedure. The States can still determine, by local laws, the jurisdiction of their courts. (See bottom of p. 56, top of p. 57.)

In *Walton* v. *Pryor, et al.*, 276 Ill. 563, 245 U. S. 675, suit was brought under the Federal Employers' Liability Act, the death occurring in Missouri. The Illinois law provided that no action should be brought to recover damages for death occurring outside of Illinois. That State refused to entertain the suit, the court saying:

> "The Supreme Court of the United States has said that there has been no attempt of Congress to enlarge the jurisdiction of the State courts but only to require its exercise consistently with local laws, and the enforcement of liability for damages occa-

sioned by a death outside of the State is not consistent with such laws" (pages 570, 571).

In *Loftus* v. *Pennsylvania R. Co.*, 107 Ohio St. 352, 266 U. S. 639, an action under the Federal Employers' Liability Act was denied a hearing because the law of the State excluded from the jurisdiction of its courts all causes against railroads for injuries suffered outside the State, unless claimant was a resident.

Loftus, a resident and citizen of Pennsylvania, an employee of the Pennsylvania Railroad Company, a corporation organized under the laws of Pennsylvania, brought suit under the Federal Employers' Liability Act to recover damages for injuries received in Pennsylvania. The suit was brought in Ohio, where the defendant operated. Defendant moved to quash the service of the summons. It was held that the federal lawmaking power could not confer compulsory jurisdiction upon the trial courts of Ohio; that the federal statute created the right but the States provided the remedy of establishing courts and declaring their jurisdiction.

Petitioner says this case merely holds that the Federal Act does not confer upon a non-resident plaintiff injured outside of the State a greater right than upon a citizen of Ohio injured in Ohio (p. 25 of petitioner's Brief). But defendant did business in Ohio, and if petitioner's previous contention is correct Congress made provision that plaintiff could maintain this action in Ohio, regardless of local laws (see p. 7 of petitioner's Brief). The early contention goes too far. If the tort is foreign in origin the Ohio venue statute bars a suit by a non-resident.

**(b) Congress cannot enlarge state jurisdiction.**

**Was it not held by Mr. Justice Story in *Martin* v. *Hunter*, 1 Wheat. 304, that Congress could not confer any of the judicial power of the United States upon the state courts? The situation was clearly explained by Mr. Justice Washington in *Houston* v. *Moore*, 5 Wheat. 1,—that Congress cannot confer any of the judicial power of the United States upon the state courts, but the latter may exercise jurisdiction even over causes arising out of the acts of Congress, if they have the authority in their own inherent powers and if Congress has not made the jurisdiction of the federal courts exclusive.**

**In *Ruckworth* v. *Judges of Hudson Common Pleas*, 58 N. J. L. 97, the relator was refused naturalization in New Jersey solely upon the ground his application was not made in accordance with the New Jersey statute. The federal statute involved had expressly selected the state courts as one of the federal agencies to hear and act upon application for naturalization.**

**Held:**

> **"* * * Congress is without power to interfere with or control state courts, except in so far as the federal courts have appellate jurisdiction" (p. 100).**
>
> **"The state establishes its own courts, defines their jurisdiction, appoints its judges and pays their salaries" (p. 101).**

**The opinion in *Murnan* v. *Wabash Railway Co.*, 246 N. Y. 244, on the authority of which this case was decided by the Court of Appeals, reads on page 248 as follows:**

"The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another State. The practice may be anomalous but it is well established. That Congress has undertaken to regulate the exercise of jurisdiction by our courts by making compulsory what in other similar cases is discretionary, seems an unreasonable conclusion and a resulting invasion of the powers of our tribunals as heretofore exercised. We conclude that a litigant who brings his action under the Federal Employers' Liability Act stands before the court in no different attitude than a litigant who brings his action under the statute of a sister State. He may not be cast out because he is suing under the act of Congress. He may not enforce his rights merely because he is suing under the act."

Petitioner's claim amounts to this—that because he sues under a federal statute he is entitled, *ipso facto*, to sue in a state court although otherwise he would not be so entitled. There is no dispute that the Act in question is part of the supreme law of the land. *Claflin* v. *Houseman*, 93 U. S. 130, 137. But the Act does not impose jurisdiction except upon the federal courts. The laws of the State must determine whether "the State has cognizance of the cause of action and may acquire jurisdiction of the parties." *Trapp* v. *Baltimore & Ohio R. Co.*, 283 Fed. 655, at p. 656. Each State decides for itself the jurisdictional limitations of its courts.

It is essential that the state jurisdiction, the state statute creating and defining the court, extends to the very case. *Walton* v. *Pryor, supra; Rushworth* v. *Judges of Hudson Common Pleas, supra; Warren, Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545, 546;

*Anglo-American Provision Co.* v. *Davis Provision Co.*, 191 U. S. 373.

Furthermore, a State may refuse to entertain jurisdiction, notwithstanding the effect is to exclude an action under a federal statute. *Walton* v. *Pryor, supra*, denied jurisdiction to an action brought under the Federal Employers' Liability Act because of a provision of a state statute.

This court said in *Anglo-American Provision Co.* v. *Davis Provision Co., supra*, that even the constitutional clause of full faith and credit did not impose jurisdiction upon a state court in a suit upon a judgment where the state court rendering the judgment did not have jurisdiction of the original cause of action.

We may summarize this entire argument in the words of Charles Warren in an article entitled "Federal Criminal Laws and the State Courts," 38 Harvard Law Review 545, at page 546:

> "While Congress has no power to *force* jurisdiction upon a State Court, it has the power to *leave* jurisdiction to a State Court."

See also *St. Louis & Iron Mountain Ry.* v. *Taylor*, 210 U. S. 281, at page 285.

Finally we come to this legitimate conclusion, that if Congress confers concurrent jurisdiction this means nothing more than the denial of exclusiveness, and the States may take jurisdiction, not by reason of the Congressional Act, but by reason of their own laws. State jurisdiction, to put it another way, arises from its own

laws, unaided by federal legislation, at times limited by federal legislation under the federal Constitution.

(c) By statute and construction, the New York courts are given discretionary jurisdiction.

It is contended by petitioner that the ordinary jurisdiction of New York, as prescribed by local statutes, is adequate to the occasion. Now between 1876 and 1913 it was the law of New York that where plaintiff was a non-resident, defendant a foreign corporation, and the cause of action did not arise within New York, the New York courts did not have jurisdiction. *Robinson* v. *Oceanic Steam Navigation Co.*, 112 N. Y. 315, 321; *Hoes* v. *The N. Y., N. H. & H. R. R. Co.*, 173 N. Y. 435; *Pietraroia* v. *N. J. & H. R. R. & F. Co.*, 197 N. Y. 434; Code of Civil Procedure, § 1780, prior to 1913 amendment.

From 1913 to date the action has been discretionary with the courts. § 1780 of the Code of Civil Procedure of New York, Laws of 1913, Chapter 60, reads, in part, as follows:

> "An action against a foreign corporation may be maintained by another foreign corporation, or by a non-resident, in one of the following cases only:
>
> • • • • • • • • •
>
> "4. Where a foreign corporation is doing business within this State."

This became part of § 47, of the General Corporation Law of New York, Laws of 1920, Chapter 916.

§ 46, of the General Corporation Law of New York, Laws of 1920, Chapter 916, derived from § 1780 of the Code of Civil Procedure, reads as follows:

> "Action against foreign corporation.—An action against a foreign corporation may be maintained by a resident of the State, or by a domestic corporation, for any cause of action."

These statutory provisions dating from 1913 have been treated in *Waisikoski* v. *Phila. & Reading Coal & Iron Co.*, 228 N. Y. 581; *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, 235 N. Y. 152; *Murnan* v. *Wabash Railway Co.*, *supra*.

In *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, *supra*, the Court said, at page 160:

> "* * * by a long line of authorities, the Courts have repeatedly refused in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a foreign state where both plaintiff and defendant were non-residents."

(d) Petitioner's argument that the Supreme Court of the State of New York is without power to refuse jurisdiction, and to dismiss a complaint, in an action under the Federal Employers' Liability Act, against a railroad common carrier, doing business in the State of New York, is not tenable.

Petitioner's Argument starts with a discussion of § 6, second clause, of the Federal Employers' Liability Act (see pp. 7, 8, 9 of petitioner's Brief). The argument is based upon false premises such as: the plaintiff can maintain his action in the district he chooses; Congress provided that the state courts should have jurisdiction; Congress has explicitly conferred a right to bring an action in the New York Supreme Court; Congress has provided that the state courts shall have concurrent jurisdiction with the federal

courts (see pp. 7 and 8 of petitioner's Brief). The conclusions are then reached that no state court can nullify the Act of Congress, that Congress had the right to confer this jurisdiction upon the state courts, and that its provisions are supreme; that no state court can avoid or refuse to accept the jurisdiction conferred; that Congress has not attempted to increase the jurisdiction of state courts; that Congress compels the state courts to exercise a jurisdiction they already possess (petitioner's Brief, pp. 7, 8, 11).

Throughout petitioner lays great stress upon *Second Employers' Liability Cases (Mondou)*, 223 U. S. 1, but does not quote:

> "there is not here involved any attempt by Congress to enlarge or regulate jurisdiction of state courts, or to control or affect their modes of procedure, * * *."

Petitioner refers to *Taylor* v. *Taylor*, 232 U. S. 363, which holds that plaintiff's share of a settlement in an action under the Federal Employers' Liability Act is determined by that Act.

Petitioner refers to *Toledo, St. L. & W. R. R.* v. *Allen*, 276 U. S. 165, which holds that the Act of Congress under which plaintiff sought recovery "took possession of the field of liability of carriers by railway for injuries sustained by employees while engaged in interstate commerce * * *" (p. 168).

Petitioner refers to *Missouri, et al.* v. *Taylor*, 266 U. S. 200, which expressly said that the federal right under the Carmack Amendment was "enforceable in a State court whenever its ordinary jurisdiction, as prescribed by local

laws, is appropriate to the occasion, and is invoked in conformity with those laws" (p. 208).

There is no claim by respondent of a right to refuse jurisdiction because petitioner's suit is based on a federal law (see petitioner's Brief, p. 34, quoting from Senate Report of March 22, 1910).

We find on page 31 of petitioner's Brief a quotation from a speech of Senator Borah and statements made by Representatives Sterling and Webb, but these quotations do not say that the state courts must exercise jurisdiction.

## POINT II

### The Order and Judgment do not violate § 2 of Article IV of the Constitution of the United States.

(a) The discrimination alleged under Article IV, § 2 of the federal Constitution is not between citizens and non-citizens, but between residents and non-residents.

Under subd. 4 of § 47 of the General Corporation Law of New York, *supra*, an action may be brought against a foreign corporation by a non-resident where a foreign corporation is doing business within New York. In the case of a Connecticut citizen residing in New York, the courts of New York would not have discretionary jurisdiction, but would have to entertain the action. The result—compulsory jurisdiction—would be the same as in the case of the New York citizen residing in New York. In neither case is citizenship the test, or of any importance whatsoever.

This same distinction, which is not merely verbal, has been made by this court and the courts of several States. *Steigleder* v. *McQuesten*, 198 U. S. 141; *LaTourette* v. *McMaster*, 248 U. S. 465; *Maxwell* v. *Bugbee*, 250 U. S. 525; *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60; *Canadian Northern R. Co.* v. *Eggen*, 252 U. S. 553; *Cummings* v. *Wingo*, 31 S. C. 427; *Central R. R. Co.* v. *Georgia, etc., Co.*, 32 S. C. 319; *Loftus* v. *Pennsylvania R. Co.*, *supra*.

(b) A discrimination is not unconstitutional, even as between citizens of different States, if there is a reasonable ground for the diversity of treatment, and we find "reasonable ground for the diversity of treatment." *Travis* v. *Yale & Towne Mfg. Co.*, *supra*, at p. 79; *Canadian Northern Ry. Co.* v. *Eggen*, *supra*; 1 *Cooley, Constitutional Limitations* (8th ed.) 49.

In dicta this court has said that a citizen of one State has the privilege of bringing suit in the courts of another State. *Ward* v. *Maryland*, 12 Wall. 418, 430; *Slaughter-House Cases*, 16 Wall. 36, 76; *Cole* v. *Cunningham*, 133 U. S. 107, 113, 114; *Chambers* v. *Baltimore & O. R. R.*, *supra*; *Missouri Pac. R. R.* v. *Clarendon Co.*, 257 U. S. 533, 535.

But the courts have not literally applied the "equal privileges" clause. *Minor* v. *Happersett*, 21 Wall. 162; *McCready* v. *Virginia*, 94 U. S. 391; *Heim* v. *McCall*, 239 U. S. 175; *Ferry* v. *Spokane P. & S. Ry.*, 258 U. S. 314; *Ballard* v. *Hunter*, 204 U. S. 241. In *Central Loan & Trust Co.* v. *Campbell*, 173 U. S. 84, 97, a non-resident's property was attached without requiring plaintiff to give a bond, although a bond was required in the attachment of resident's

property. *Hess* v. *Pawloski*, 274 U. S. 352, allowed a different procedural remedy against a non-resident. *Canadian Northern Ry.* v. *Eggen, supra*, made clear that a non-resident might not have the same rights as a resident. In taxation matters we find permissible distinctions. *Travellers' Insurance Co.* v. *Connecticut*, 185 U. S. 364; *Shaffer* v. *Carter*, 252 U. S. 37.

New York's judicial policy in this regard is based upon reason. The courts "have never refused to entertain jurisdiction of a cause of action arising upon contract," even though both parties reside in other States. *Smith* v. *Crocker*, 14 App. Div. 245, 250; cited in *Furbush* v. *Nye*, 17 App. Div. 325, 326, and other cases. In *Smith* v. *Crocker, supra*, we find this sentence: "We are referred to a number of cases (*Ferguson* v. *Neilson*, 33 N. Y. St. Repr. 814; *Robinson* v. *Oceanic Steam Nav. Co.*, 112 N. Y. 315) in which it was held that the courts of this State will not retain jurisdiction of and determine an action for tort between parties residing in other States on causes of action arising out of the State, as a matter of public policy, unless special reasons are shown to exist which make it necessary or proper so to do" (p. 249).

In respect of actions for tort, has New York acted reasonably and adequately? This is the test of *Canadian Northern Ry. Co.* v. *Eggen, supra*, which quotes from *Robinson* v. *Oceanic Steam Navigation Co., supra*. Jurisdiction was refused in the latter case because of a statute and the Court of Appeals said the discrimination between resident and non-resident plaintiffs was probably based upon reasons of public policy (p. 323). New York "courts should not be vexed with litigation between non-resident

parties over causes of action which arose outside of our territorial limits" (pp. 323, 324). In *Ferguson* v. *Neilson, supra*, we find this: "Our courts are not supported by the people for any such purpose." In *Collard* v. *Beach*, 81 App. Div. 582, 93 App. Div. 339, is this: "• • • the calendars of the courts of this State are congested • • • it would impose an undue burden upon the courts of our State if the practice were established of assuming jurisdiction in such cases" (pp. 340, 341). It is a simple and transparent device. The Court of Appeals in *Hoes* v. *N. Y., N. H. & H. R. R. Co., supra*, said: "If this can be done it will open wide the floodgates of litigation in similar cases, establish a new legal industry and impose thereby upon our already over worked courts the obligation to try actions imported from a foreign jurisdiction" (p. 441). It impedes the administration of justice, it burdens the people of the State with expense, it is solely for the benefit of residents of other States. (Please see *Pietraroia* v. *N. J. & H. R. R. & F. Co., supra.*) It would be reasonable to take into consideration the heavy expense to carriers. *Davis* v. *Farmers' Co-operative Equity Co.*, 262 U. S. 312.

Respondent made the motion to dismiss at the outset (R., 5). Both petitioner and respondent were and are in Connecticut (R., 6, 7, 9). The record shows no fact objection to trial in Connecticut other than the allegation of powerful influence of respondent in Connecticut and that verdicts in that State are small and inadequate in cases for personal injury against this respondent (R., 13, 16).

The Court of Appeals decided the *Douglas* case on the authority of *Murnan* v. *Wabash Railway Co., supra.* It becomes pertinent to define the limitations and purport of the

latter ruling. After setting out § 47 of the General Corporation Law (Cons. Laws, ch. 23) the opinion reads:

> "Although the rule prohibits a court of general jurisdiction from refusing to exercise its jurisdiction in its discretion, it has often been held that the courts of this State may refuse in their discretion to entertain jurisdiction over causes of action arising out of a tort committed in a sister State where both the plaintiff and defendant are non-residents (*Gregonis v. P. & R. Coal & Iron Co.*, 235 N. Y. 152, 160, and cases cited). While no controlling reason compelled, the Special Term refused to assume jurisdiction; it refused, it would seem, for reasons of convenience, to hear the case and vacated the service of the summons under the authorities referred to" (pp. 246, 247).

> "The courts of New York exercise their discretion in all other cases where a tort action is brought by one non-resident against another under the laws of another State" (p. 248).

> "This motion of the defendant for an order vacating the service of the summons should not have been granted as matter of law. Neither should it have been denied except in the exercise of a sound discretion" (p. 248).

> "It is urged with force that it was reasonable for a resident of Connecticut in reduced circumstances to sue the defendant in New York, where he could obtain service of summons, rather than to go to Indiana where defendant was incorporated, or to Michigan where the accident occurred. As we have the case before us on a question of law only and it appears that the Appellate Division has not considered the question of discretion, we may properly remit the case to that court to review the order from that point of view" (p. 249).

**(c) Because the exercise of jurisdiction would be a burden on interstate commerce, the refusal to exercise jurisdiction is at least reasonable and, therefore, not a violation of § 2 of Article IV of the Constitution.**

In *Davis* v. *Farmers' Co-operative Equity Co., supra,* the defendant may not have been "doing business" in the State, but by discussion of the commerce clause this court treated it otherwise. The case is authority for the proposition that a suit by a non-resident against a foreign railroad corporation on a foreign cause of action is an unreasonable burden on interstate commerce. We find support in *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197, 205; *Atchison, etc., Ry.* v. *Wells*, 265 U. S. 101; *Weinard* v. *Chicago, M. & St. P. Ry. Co.*, 298 Fed. 977. It is not an unreasonable burden on interstate commerce to require a designated agent to accept service for causes of action arising within the State. *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. This very distinction lends support to the proposition. *Hoffmann* v. *Foraker*, 274 U. S. 21, is not in point because there the railroad was not a foreign corporation and was sued in the State of its incorporation.

The Federal Employers' Liability Act makes the jurisdiction of the courts of the United States, in cases under the Act, concurrent with that of the courts of the several States. Congress has expressly imposed a burden on interstate commerce where suits are brought in the federal courts, but has imposed no such burden where suits are brought in the state courts.

**(d) Under New York statutes respondent has not consented to more than discretionary jurisdiction.**

The pertinent statutory provisions in relation to foreign corporations, doing business within the State of New York, are to be found in L. 1927, ch. 425, as follows:

"§ 15. *Authorization of foreign corporations, other than moneyed corporations, to do business within the state.* A foreign corporation, other than a moneyed corporation, shall not do business in this state without having first obtained from the secretary of state a certificate of authority. To obtain such certificate, the corporation shall comply with the following conditions:

"1. It shall present to the secretary of state a statement and designation in its corporate name, signed and acknowledged by its president or a vice-president, or its secretary, treasurer, managing director or attorney in fact, which shall set forth the state or country of its incorporation, the place where its office within this state is to be located, the business which it proposes to do within this state, and a designation of the secretary of state as its agent upon whom all process in any action or proceedings against it may be served within this state.

• • • • •

"§ 16. *Restrictions.* The following provisions shall be applicable to a statement and designation under section fifteen:

"1. It shall not be filed if it sets forth any business for which a corporation or corporations could not be formed under a general law of this state, other than the banking law or the insurance law.

"2. If it sets forth any business for which a domestic corporation could be formed only with the consent or approval of a justice of the supreme court, a state officer, state department, or state or local board or body, the consent or approval of such justice, officer, department, board or body shall be endorsed thereon, or annexed thereto.

"§ 16-a. *Certificate of authority.* 1. The secretary of state, subject to the provisions of sections six and sixteen, and upon payment of the fees required by law, shall file the documents prescribed in section fifteen and shall issue to the corporation a certificate of authority, stating the date of the filing of such documents and that the corporation is authorized to do, in this state, the business set forth in the statement and designation, a copy of which shall be annexed thereto.

"2. Upon the issuance of such certificate the corporation may do, in this state, any of the business referred to in the certificate of authority and no other.

"§ 16-b. *Existing authority and designation continued.* Every corporation which, at the time this section takes effect, has authority to do business in the state pursuant to a certificate heretofore granted by the secretary of state, shall continue to have such authority. The designation heretofore made by any such corporation of a person upon whom all process against it may be served within the state shall continue in full force and effect until the filing in the office of the secretary of state of a written revocation by the corporation of such designation, or until the death, resignation or removal from the state of the person so designated, and thereupon the secretary of state shall become the agent of the corporation upon whom all process in any action or proceeding against it may be served within the state."

* * * * *

"§ 16-g. *Contracts of unauthorized corporation not enforceable.* A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority. This prohibition shall also ap-

> ply to any successor in title of such foreign corporation and to any person claiming under such successor or such foreign corporation or under either of them."

Can an action be maintained against a foreign corporation doing business within a State, the cause of action not arising within the State and not arising out of business done within the State, where service is made upon the designated agent, who is also an officer, when the corporation has not expressly consented to jurisdiction involving foreign transitory causes of action? In *Bagdon* v. *Philadelphia & Reading Coal & Iron Co.*, 217 N. Y. 432, it was held by the Court of Appeals that the actions in which the designated agent is to represent the corporation are not limited. We appreciate that the respondent "takes the risk of the construction that will be put upon the statute and the scope of the agency by the State Court." *Mitchell Furn. Co.* v. *Selden Breck Co.*, 257 U. S. 213, 216. On the other hand, we have the statement of this court in *Missouri Pac. R. R. Co.* v. *Clarendon Co.*, *supra*, as follows:

> "Indeed, so clear is this that, in dealing with statutes providing for service upon foreign corporations doing business in the State upon agents whose designation as such is especially required, this court has indicated a leaning toward a construction where possible, that would exclude from their operation causes of action not arising in the business done by them in the State. *Mitchell Furniture Co.* v. *Selden Breck Construction Co.*, *ante*, 213; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8, 22; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 130" (pp. 535, 536).

To effect service upon a foreign corporation in accordance

with the laws of New York we must have a case "where constitutionally and legally a foreign corporation can be made a defendant in our courts." *Dollar Co.* v. *Canadian C. & F. Co.*, 220 N. Y. 270, 275. We must look beyond the personal service upon the respondent. Jurisdiction may be acquired by express consent but we must look to the terms of the consent. It is also true that this court has worked out, in some instances, the fiction of an implied consent. A question arises whether mere corporate presence suffices to give jurisdiction and certainly it does not if the cause of action arose in another State and service is made upon a public official. *Old Wayne Life Association* v. *McDonough*, 204 U. S. 8; *Simon* v. *Southern Railway*, 236 U. S. 115. In *Smolik* v. *Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148, approved in *Penna. Fire Ins. Co.* v. *Gold Issue Mining Co.*, 243 U. S. 93, the fact that a foreign corporation did business within a State was held to subject it to jurisdiction on the ground of reasonableness. But in the case at bar we have the instance of a designated agent.

From the Record it does not appear whether the designation was made prior to 1913 or subsequent thereto. If made prior to 1913 the laws of New York provided that a foreign corporation might be sued where the cause of action arose within the State. *Code of Civil Procedure*, § 1780. This cause of action did not arise within the State. If made subsequent to 1913 the laws of New York provide that a foreign corporation may be sued if doing business within the State. *General Corporation Law*, §§ 46 and 47. It has been held this is discretionary jurisdiction. See *Gregonis* v. *Phila. & Reading Coal & Iron Co.*, *supra*.

This consent, therefore, if we adopt the consent theory of jurisdiction, as we must in the circumstances, is extremely limited, under the statutes, in case of suit by nonresident. It cannot be said that respondent has consented to more than discretionary exercise of jurisdiction, and we see excellent reasons for a refusal to exercise jurisdiction.

(e) To treat this case as one of compulsory jurisdiction would impair the obligation of the contract between the respondent and the State of New York, in violation of Article I, § 10, par. 1 of the Constitution.

"We are construing a contract." *Bagdon* v. *Philadelphia & Reading Coal & Iron Co., supra.* The consent of the respondent should be limited to the statutes in force at the time such consent is given. If given prior to 1913 no action could be brought unless it arose within the State. If given subsequent to 1913 the jurisdiction is discretionary. The imposition of further conditions cannot be made. *Erie Railroad* v. *Pennsylvania*, 153 U. S. 628.

(f) Petitioner's argument as to alleged violation of Article IV, § 2 of the Constitution is invalid.

Petitioner's Brief (p. 15) says that the New York courts grant to plaintiffs the absolute right to sue whether citizens of New York, residents of New York, or aliens resident in New York. This must make it clear, granting the above statement, that New York does not discriminate against citizens of other States but for absolute right to sue requires that plaintiff shall be a citizen or a resident of New York. There is no doubt that if a person is born

or naturalized in the United States, and subject to the jurisdiction thereof, and resides in New York at the time of birth or naturalization, he is a citizen of New York. It does not follow that a resident of New York, aside from an alien, is a citizen of the United States and a citizen of New York, as alleged on page 15 of petitioner's Brief.

Petitioner seeks to distinguish *Chambers* v. *B. & O. R. R. Co., supra*, on the ground that at common law there is no cause of action for death, and that the Ohio statute provided such an action could be brought in Ohio only for the death of a citizen of Ohio, but petitioner forgets that the action arose under the Pennsylvania statute and Ohio discriminated against the widow of the deceased on the basis of her husband's citizenship.

## CONCLUSION

**We respectfully submit that the judgment should be affirmed.**

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